

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 197**

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Docket No. CH-0752-09-0258-I-1

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**Kyle A. Taylor,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

October 2, 2009

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William M. Tyler, Jr., AFGE Local 2192, St. Louis, Missouri, for the  
appellant.

Kent E. Duncan, Esquire, St. Louis, Missouri, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant filed a timely petition for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the appellant's petition for review, AFFIRM the initial decision's findings regarding the agency's charges, VACATE the initial decision's findings regarding the removal penalty, and MITIGATE the removal penalty to a 30-day suspension.

### BACKGROUND

¶2 The appellant was a GS-0998-06 Claims Assistant with the agency's Regional Office in St. Louis, Missouri. Initial Appeal File (IAF), Tab 1, Tab 6, Subtabs 4a-4c.

¶3 In October 2008, the agency's Office of Inspector General (OIG) conducted an audit of four of the agency's regional claims offices and discovered veterans' benefits claims documents in shredder bins in all four of those regional offices. As a result of the OIG findings, the agency provided oral and written instructions regarding documents that could be placed in shredder bins. The agency also ordered an immediate halt to the shredding of documents and ordered supervisors to inspect shredder bins to determine if there were any other claims-related materials placed in the shredder bins. IAF, Tab 6, Subtabs 1, 4g-4h, Tab 9 at 2. When the agency found claims-related documents in the appellant's shred bin, the agency conducted an administrative investigation into the appellant's possible misconduct. IAF, Tab 6, Subtabs 1, 4d-4g.

¶4 Following the investigation, the agency proposed to remove the appellant based on the following charges: (1) Negligence that adversely affects veterans' claims; (2) Failure to follow supervisory instructions; and (3) Destruction of claimant documents. *Id.*, Subtab 4c. In support of the first charge, the agency listed 55 specifications asserting that the appellant had placed veterans' benefits claims documents for 54 veterans and 1 veteran's widow in his shred bin. *Id.* at 1-7. In support of the second charge, the agency listed 55 specifications asserting that the appellant's placement of the 55 respective claims documents in his shred bin was in violation of his supervisor's instructions regarding the disposition of the documents. *Id.* at 7-13. In support of the third charge, the agency listed six specifications in which it asserted that six of the claims benefits documents that had been placed into the appellant's shred bin had been torn into small pieces. *Id.* at 13-14. The appellant provided written and oral responses to the proposed removal. IAF, Tab 6, Subtab 4b at 1. In the agency's November 29, 2008

decision notice, the deciding official found that the evidence supported all of the charges and specifications and he noted in discussing the penalty determination factors set forth in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), that he would have removed the appellant even if only one of the charges had been sustained. *Id.* at 2. The appellant was removed effective December 8, 2008. IAF, Tab 6, Subtabs 4a-4b.

¶5 On appeal to the Board, the appellant challenged the sufficiency of the agency's evidence in support of its charges and asserted that the removal penalty was excessive. IAF, Tab 1 at 3, Tab 9 at 3-4. The appellant asserted that he did not commit the charged misconduct, that there was no previous agency policy on when documents could be placed in shred bins, that the removal penalty exceeded the range of penalties provided for in the agency's table of penalties, and that the removal penalty was inconsistent with the penalty imposed upon other employees who had been disciplined for the same or similar misconduct. IAF, Tab 9 at 3-4. The administrative judge (AJ) held the appellant's requested hearing on March 16-17, 2009. IAF, Volume 4, Hearing Tapes (HT).

¶6 In the initial decision following the hearing, the AJ thoroughly reviewed the testimony of the material witnesses. IAF, Tab 16, Initial Decision (ID) at 2-4. To the extent there was a conflict between the testimony of the appellant and the agency's witnesses, the AJ assessed the credibility of the testimony using the criteria set forth in *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). ID at 4-8. The AJ found that the agency proved by preponderant evidence the first charge and all of its 55 specifications. ID at 4-6. The AJ found that the agency proved by preponderant evidence specifications 1 through 28 of the 55 specifications to the second charge and, thus, that the agency had proven the second charge. ID at 6-7. The AJ found that the agency's evidence was insufficient to prove that the appellant had placed the torn claims-related documents into his shred bin, given the en masse collection of the contents of the employees' shred bins, rather than conducting a separate examination of each

employee's shred bin and, thus, that the agency's evidence was insufficient to prove the third charge. ID at 7-8. The AJ found that the agency had established a nexus between the charged misconduct and the efficiency of the service. ID at 8.

¶7 The AJ found that, because he had not sustained all of the agency's charges, he could potentially mitigate the penalty imposed to the maximum reasonable penalty for the sustained charges as long as the agency had not indicated in its decision notice or during the Board proceedings that it desired that a lesser penalty be imposed for the charges that were sustained. *Id.* The AJ found that the deciding official properly considered the relevant *Douglas* factors. *Id.* The AJ noted the deciding official's testimony that he would have imposed the removal penalty even if only one of the charges had been sustained. *Id.*; HT, Side 1B (testimony of deciding official, Regional Office Director David Unterwagner). The AJ agreed with the deciding official's testimony that the appellant's failure to properly process the veterans' claims warranted the appellant's removal. ID at 8-9. Accordingly, the AJ affirmed the agency's removal action. ID at 1, 9. However, the AJ failed to address the appellant's claims that the removal penalty exceeds the maximum penalty provided for under the agency's table of penalties and that it exceeded the penalties imposed upon other employees who had committed the same or similar misconduct.

¶8 The appellant filed a timely petition for review and the agency filed a timely response in opposition. Petition for Review File (PFRF), Tabs 1, 3.

### ANALYSIS

The AJ correctly found that the agency proved the sustained charges through preponderant evidence.

¶9 The appellant asserts that the AJ erred in finding that the agency proved the sustained charges and specifications through preponderant evidence. Specifically, the appellant challenges the agency's evidence based on his assertions that the shred bin in which the evidence was found was not secured,

that others had access to his shred bin, and that the agency's method of collecting the evidence failed to negate the possibility that someone else had put the documents into his shred bin. PFRF, Tab 1 at 7. We have reviewed the appellant's assertions, the record, and the AJ's analysis and findings. We find that the appellant's assertions reflect his mere disagreement with the AJ's reasoned factual findings regarding the agency's charges. In particular, we note that the appellant does not dispute the AJ's findings that the documents were assigned solely to him and that he had received instructions on how the documents were to be processed. ID at 2-7. The appellant does not challenge the AJ's finding that there was no evidence showing that someone had a motive to take documents assigned to him and then place them in his shred bin. ID at 5. The appellant does not challenge the AJ's finding that his personal material was found with the documents assigned to him that were in his shred bin. ID at 3, 6. Moreover, the appellant does not challenge the fact that he personally handed his supervisor his shred bin and that the agency had found some 190 claims-related documents in his shred bin. PFRF, Tab 1 at 7; IAF, Tab 6, Subtab 4e at 3, Tab 9 at 3. Despite that volume of material in his shred bin, the appellant did not assert when he gave the contents of the bin to his supervisor that all of the material in the bin could not have been placed into the bin by him, nor did he make any effort to review the material in the bin so as to be able to timely say that he did not put this material into this shred bin. Thus, the appellant has not shown error in the AJ's finding that the agency proved the sustained charges and specifications through preponderant evidence, and we AFFIRM the initial decision's findings regarding the agency's charges and the nexus between the sustained charges and the efficiency of the service.

The AJ erred in failing to address the appellant's claims that the removal penalty exceeded the maximum penalty provided in the agency's table of penalties and that the agency imposed less severe penalties upon other employees who had committed similar misconduct that was discovered as a result of the same OIG investigation.

¶10 The appellant reasserts on review that the removal penalty exceeds the maximum penalty provided for under the agency's table of penalties for the sustained misconduct and, further, that it constitutes a disparate penalty in that it exceeds the penalties imposed on two other employees who were also found to have committed the same or similar misconduct. PFRF, Tab 1 at 8; IAF, Tab 8, Subtab 5. The Board has found that an agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty. *See Phillips v. Department of the Interior*, [95 M.S.P.R. 21](#), ¶ 17 (2003), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005). Moreover, the Board and its reviewing court have found that an agency's table of penalties is merely a guide and is not mandatory unless the agency has a specific statement making the table mandatory and binding rather than advisory. *Id.*; *see also Farrell v. Department of the Interior*, [314 F.3d 584](#), 590-92 (Fed. Cir. 2002); *Werts v. Department of Transportation*, [17 M.S.P.R. 413](#), 415 (1983), *recons. denied sub nom. Burns v. Department of Transportation*, [22 M.S.P.R. 388](#) (1984), *aff'd*, [783 F.2d 196](#) (Fed. Cir. 1986). The appellant did not present any evidence below or on review establishing that the agency's table of penalties is mandatory and binding and not simply advisory, nor has he even made such an assertion. PFRF, Tab 1; IAF, Tab 9 at 3-4, Tab 13 at 3. The deciding official testified that the agency's table of penalties is merely a guide and is not mandatory. HT, Side 1A (testimony of Unterwagner). Thus, we do not find the removal penalty to be unreasonable based solely on the fact that it exceeds the maximum penalty under the agency's table of penalties for the first instance of misconduct committed by the appellant.

¶11 The appellant's allegation that the agency treated him disparately to another employee, without a claim of prohibited discrimination, is an allegation of

disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty, but it is not an affirmative defense. *See Vargas v. U.S. Postal Service*, [83 M.S.P.R. 695](#), ¶ 9 (1999). The consistency of the penalty is only one of the factors to be considered under *Douglas* in determining the reasonableness of an agency-imposed penalty. *See Thomas v. Department of Defense*, [66 M.S.P.R. 546](#), 552, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table). Moreover, where an imposed penalty is appropriate for the sustained charge(s), an allegation of disparate penalties is not a basis for reversal or mitigation of the penalty unless the agency knowingly and intentionally treated similarly-situated employees differently or if the agency decides to begin levying a more severe penalty for a certain offense without giving notice of the change in policy. *See Whelan v. U.S. Postal Service*, [103 M.S.P.R. 474](#), ¶ 13 (2006), *aff'd*, 231 F. App'x 965 (Fed. Cir. 2007); *Jefferies v. Department of the Navy*, [78 M.S.P.R. 255](#), 261-62 (1998). To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, [16 M.S.P.R. 404](#), 407 (1983). We find that requirement satisfied under the circumstances of this case because the disciplinary actions taken against the appellant and the two comparative employees were the result of the agency's unified response to the OIG findings of veterans' benefits documents in shred bins in all four of the regional offices investigated. IAF, Tab 6, Subtabs 1, 4g-4h, Tab 9 at 2.

¶12 The appellant's evidence regarding the two comparative employees, who were disciplined as a result of the agency's unified response to the OIG investigation, shows that the agency proposed to remove those two employees for having 28 veterans' benefits-related documents and 87 veterans' benefits-related documents in their shred bins respectively. IAF, Tab 9, Exs. E, G. The proposal notices for both of the comparative employees stated, in part, that:

On June 26, 2008, you attended Records Management Training which clearly states your responsibility as a VA [Veterans

Administration] employee to safeguard veteran documents and to only destroy records in accordance with the approved records control schedule. You also received the VBA PIES [Personnel Information Exchange System] Training Manual that explains the partnership agreement between the Records Management Center (RMC) and the National Personnel Records Center (NPRC). The agreement is based on our duty to safeguard veteran records while in our possession. Your actions not only impacted 85 veterans and their families[,] but may also negatively impact the relationship between RMC and NPRC. . . . Your actions are a direct reflection on your reputation for honesty and integrity. As a result, I have grave concerns with retaining you as a VA employee.

IAF, Tab 9, Ex. E at 1-2, Ex. G at 1-2. Both of the removal proposals were issued to the comparative employees on October 23, 2008, prior to the removal proposal issued to the appellant on November 7, 2008. IAF, Tab 6, Subtab 4c; Tab 9, Exs. E, G. The agency mitigated the removal proposal for the employee with 28 veterans' benefits-related documents in his shred bin to a 15-day suspension. IAF, Tab 9, Ex. D at 1. The agency mitigated the removal proposal of the employee with 87 veterans' benefits-related documents in his shred bin to a 30-day suspension. *Id.*, Ex. F at 1. The decision notices were issued to both of the comparative employees on November 21, 2008, prior to the removal decision notice issued to the appellant on November 29, 2008. IAF, Tab 6, Subtab 4b; Tab 9, Exs. D, F.

¶13 Where, as here, an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *See Lewis v. Department of Veterans Affairs*, [111 M.S.P.R. 388](#), ¶ 8 (2009); *Woody v. General Services Administration*, [6 M.S.P.R. 486](#), 488 (1981). The record reflects that the agency failed to explain its disparate treatment of employees disciplined as a result of its unified action in response to the OIG investigation, despite the appellant's record evidence of that disparate treatment. We find that the agency failed to prove a legitimate reason for the

difference in treatment by a preponderance of the evidence. *See Lewis*, [111 M.S.P.R. 388](#), ¶ 8. We also find that the agency improperly imposed a more severe penalty for the same misconduct without giving prior notice of a change in its policy. *See Jefferies*, 78 M.S.P.R. at 261-62. Thus, we find that a 30-day suspension is the maximum reasonable penalty given the penalties the agency imposed on the two comparative employees. *See Tucker v. Veterans Administration*, [11 M.S.P.R. 131](#), 133-34 (1982). Accordingly, we VACATE that portion of the initial decision affirming the agency's removal penalty and we MITIGATE the removal penalty to a 30-day suspension.

#### ORDER

¶14 We ORDER the agency to cancel the appellant's removal, effective December 8, 2008, to restore the appellant to his former position, and to substitute for the removal a 30-day suspension. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶16 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

- ¶17 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).
- ¶18 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.
- ¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.



## **DFAS CHECKLIST**

### **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT  
CASES

### **CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

### **ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:**

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
  - a. Outside earnings with copies of W2's or statement from employer.
  - b. Statement that employee was ready, willing and able to work during the period.
  - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



## **NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES**

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### **Attachments to AD-343**

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.